

CAS v. MPPL & ANOR

A

COURT OF APPEAL, PUTRAJAYA
 ABANG ISKANDAR JCA
 UMI KALTHUM ABDUL MAJID JCA
 NALLINI PATHMANATHAN JCA
 [CIVIL APPEAL NO: W-02(A)-1013-05-2016]
 15 OCTOBER 2018

B

EVIDENCE: *Proof – Paternity – Determination of biological father of child – Third party to marriage claimed to have had affair with wife – Third party sought DNA test to be carried out to determine biological father of child – Whether fact of marriage conclusive fact of legitimacy and paternity of child – Difference between ‘paternity’ and ‘legitimacy’ – Whether there are provisions of law that statutorily bars paternity tests – Evidence Act 1950, s. 112*

C

FAMILY LAW: *Children – Paternity – Determination of biological father of child – Third party to marriage claimed to have had affair with wife – Third party sought DNA test to be carried out to determine biological father of child – Whether fact of marriage conclusive fact of legitimacy and paternity – Difference between ‘paternity’ and ‘legitimacy’ – Whether it was in best interest of child to know her biological parents – Whether legitimacy preceded child knowing truth of paternity – Whether there are provisions of law that statutorily bars paternity tests*

D

E

CIVIL PROCEDURE: *Disposal on point of law – Paternity – Determination of biological father of child – Third party to marriage claimed to have had affair with wife – Third party sought DNA test to be carried out to determine biological father of child – Whether third party caught by s. 112 of Evidence Act 1950 – Whether fact of marriage conclusive fact of legitimacy and paternity of child – Whether there were crucial matters to be ventilated by parties – Rules of Court 2012, O. 14A*

F

The respondents (‘the defendants’) were married in March 2007 and during the marriage, the first respondent (‘the first defendant’) gave birth to a daughter (‘Child C’) in June 2008. According to the appellant (‘the plaintiff’), (i) he had an affair with the first defendant before the first defendant married the second respondent (‘the second defendant’) and this affair continued even after the defendants’ marriage; (ii) when the second defendant was not in the country, the plaintiff lived with the first defendant and Child C as a family; (iii) he paid a monthly maintenance for Child C but the payment stopped when the first defendant closed her account; and (iv) the first defendant stopped giving him access to Child C in December 2013 and they ended their affair in early 2014. The plaintiff commenced an action at the High Court, by way of an originating summons (‘encl. 5’), seeking reliefs that (i) a DNA test be carried out in order to determine whether the plaintiff was the

G

H

I

- A biological father of Child C; and (ii) if the test shows that the plaintiff was the father of Child C, the plaintiff sought (a) to be declared as the biological father of Child C and the birth certificate of the child is rectified to reflect the same; (b) to be given joint guardianship; (c) to be given reasonable access rights according to his work schedule; and (d) for the defendants, or their
- B representatives, to be prevented from bring Child C out of the country without the plaintiff's written permission. According to the plaintiff, it was necessary for Child C to know who her birth father was in case of any future medical emergencies. The defendants applied, *via* encl. 16, for, *inter alia*, the determination of questions of law, pursuant to O. 14A of the Rules of Court 2012 ('ROC') and submitted that since s. 112 of the Evidence Act 1950 ('the
- C EA') stated that Child C, who was born to the defendants during the subsistence of a legal marriage, was the legal child of the defendants, encl. 5 must be dismissed ('prayer 1'). The High Court Judge ('the HCJ') allowed prayer 1 of encl. 16 and dismissed encl. 5. In arriving at the decision, the HCJ found that (i) the plaintiff's action was caught by s. 112 of the EA. The DNA test sought by the plaintiff concerned both the paternity and legitimacy of Child C. Section 112 presumes the fact of marriage as conclusive proof of legitimacy. Being born into the defendants' marriage was conclusive proof that Child C was their legitimate child. This presumption may only be rebutted on the grounds of non-access between the parties to the
- E marriage. The law does not authorise the use of DNA tests to challenge paternity and to rebut the presumption in this way; and (ii) allowing the DNA test would have adverse effects on the welfare of Child C. If the DNA test was allowed and Child C was discovered to be illegitimate, it would have negative consequences for Child C and disrupt her happy family life. Hence,
- F the present appeal. Supporting his appeal, the plaintiff argued that (i) encl. 5 had nothing to with the legitimacy of Child C as it only concerned with the determination of her paternity; (ii) it was in the best interest of Child C to know who her biological parents were; and (iii) s. 112 of the EA had nothing to do with this case and hence, the HCJ erred in holding that Child C's legitimacy preceded the child knowing the truth of her paternity.
- G

Held (allowing appeal)**Per Nallini Pathmanathan JCA delivering the judgment of the court:**

- (1) The HCJ fell into error when Her Ladyship linked paternity with legitimacy. The concepts of 'paternity' and 'legitimacy' should
- H necessarily be separated. 'Paternity' concerns a question of fact while 'legitimacy' a question of law. (paras 22 & 24)

I

- (2) Section 112 of the EA does not bar enquiries into paternity yet, at the same time, conclusively presumes legitimacy. Enquiries *per se* into paternity do not illegitimise a child. The emphasis on the fear of illegitimising Child C was not the determining factor when deciding to order a DNA test to determine the paternity. Instead, the best interest of the child to know his/her biological parents is the larger concern. This legal issue should have been accorded full consideration after a full ventilation of the factual matrix to determine the disputed factual issues. The HCJ failed to do this. The HCJ erred in summarily determining an important point of law. The defendants' encl. 16 was dismissed. The HCJ fell into error in Her Ladyship's pre-occupation with the supposed fear of illegitimising Child C. The 'supposed' policy behind s. 112 of the EA in not wanting to illegitimise children ought no longer be the sole judicial philosophy in light of modern day global advancements in science and international human rights law. (paras 35-38) A B C
- (3) The defendants denied the allegations made by the plaintiff in respect of his purported relationship with the first defendant and Child C. These were crucial matters. The plaintiff's claim ought not to have been dismissed outright in the absence of judicial determination on these crucial issues. Such determination could only be made with full *viva voce* evidence. Enclosure 5 was remitted to the High Court and converted into a writ action. This was in accordance with O. 1A, O. 2 r. 1, O. 28 r. 8 and O. 92 r. 4 of the ROC. This way, the parties may fully ventilate all issues. (paras 40-41) D E

Bahasa Malaysia Headnotes

Responden-responen ('defendan-defendan') berkahwin pada Mac 2007 dan semasa perkahwinan ini, responden pertama ('defendan pertama') melahirkan seorang anak perempuan ('Kanak-kanak C') pada Jun 2008. Menurut perayu ('plaintif'), (i) dia menjalin hubungan sulit dengan defendan pertama sebelum defendan pertama berkahwin dengan responden kedua ('defendan kedua') dan hubungan ini berterusan hingga defendan-defendan sudah berkahwin; (ii) semasa defendan kedua berada di luar negara, plaintif tinggal bersama-sama defendan pertama dan Kanak-kanak C sebagai satu keluarga; (iii) dia membayar nafkah bulanan Kanak-kanak C tetapi bayaran ini dihentikan apabila defendan pertama menutup akaunnya; dan (iv) defendan pertama berhenti memberi akses kepadanya, terhadap Kanak-kanak C, pada Disember 2013 dan mereka menamatkan hubungan sulit mereka pada awal 2014. Plaintif memulakan satu tindakan di Mahkamah Tinggi, melalui satu saman pemula ('lampiran 5'), memohon relief-relief agar (i) ujian DNA dijalankan untuk menentukan sama ada plaintif ialah bapa F G H

I

- A kandung Kanak-kanak C; dan (ii) jika ujian ini menunjukkan plaintif ialah bapa Kanak-kanak C, plaintif memohon (a) diisytiharkan sebagai bapa kandung Kanak-kanak C dan sijil kelahiran anak tersebut dibetulkan agar mencerminkan fakta ini; (b) diberi penjagaan bersama; (c) diberi hak akses munasabah yang sesuai dengan jadual kerjanya; dan (d) agar defendan-defendan, atau wakil-wakil mereka, dihalang membawa Kanak-kanak C keluar dari negara tanpa kebenaran bertulis plaintif. Menurut plaintif, penting buat Kanak-kanak C tahu siapa bapa kandungnya jika timbul kecemasan perubatan di masa hadapan. Defendan-defendan memohon, melalui lampiran 16, untuk pemutusan soalan-soalan undang-undang, bawah
- B A. 14A Kaedah-kaedah Mahkamah 2012 ('KKM'), dan menghujahkan, antara lain, oleh kerana s. 112 Akta Keterangan 1950 ('AK') menyatakan Kanak-kanak C, yang lahir semasa berlangsungnya satu perkahwinan sah, ialah anak defendan-defendan yang sah, lampiran 5 mesti ditolak ('permohonan 1'). Hakim Mahkamah Tinggi ('HMT') membenarkan permohonan 1 lampiran 16 dan menolak lampiran 5. Dalam mencapai keputusan beliau, HMT memutuskan (i) tindakan plaintif terbatas oleh s. 112 AK. Ujian DNA yang dipohon oleh plaintif adalah berkenaan paterniti dan kesahatarafan Kanak-kanak C. Seksyen 112 menganggap fakta perkahwinan sebagai keterangan konklusif kesahatarafan. Anggapan ini hanya boleh disangkal atas alasan ketiadaan akses antara pihak-pihak yang berkahwin.
- C Undang-undang tidak membenarkan penggunaan ujian DNA untuk mencabar paterniti dan menyangkal anggapan dalam cara ini; dan (ii) membenarkan ujian DNA akan mempunyai kesan buruk pada kebajikan Kanak-kanak C. Jika ujian DNA dibenarkan dan Kanak-kanak C didapati tidak sah taraf, ini akan memberi kesan negatif pada Kanak-kanak C dan mengganggu kehidupannya di sisi keluarga bahagia. Maka timbul rayuan ini. Menyokong rayuannya, plaintif menghujahkan (i) lampiran 5 tiada kaitan dengan kesahatarafan Kanak-kanak C kerana lampiran 5 hanya berkaitan penentuan paterniti; (ii) Kanak-kanak C perlu tahu siapa ibu bapa kandungnya demi kepentingannya sendiri; dan (iii) s. 112 AK tiada kena-mengena dengan kes ini dan bersangkutan itu, HMT terkhilaf dalam memutuskan kesahatarafan Kanak-kanak C lebih penting daripada kanak-kanak tersebut tahu kebenaran tentang paternitinya.

Diputuskan (membenarkan rayuan)

Oleh Nallini Pathmanathan HMR menyampaikan penghakiman mahkamah:

- H (1) Hakim Mahkamah Tinggi terkhilaf apabila beliau mengaitkan paterniti dengan kesahatarafan. Konsep 'paterniti' dan 'kesahatarafan' mesti diasingkan. 'Paterniti' adalah satu soalan fakta manakala 'kesahatarafan' adalah satu soalan undang-undang.

I

- (2) Seksyen 112 AK tidak menghalang inkuiri paterniti tetapi, pada masa sama, secara muktamad mengandaikan kesahatarafan. Inkuiri paterniti, dengan sendirinya, tidak menjadikan seorang anak tidak sah taraf. Penekanan pada kebimbangan menjadikan Kanak-kanak C tidak sah taraf bukan faktor penentuan dalam memutuskan untuk memerintahkan ujian DNA menentukan paterniti. Sebaliknya, kepentingan kanak-kanak tersebut mengetahui ibu bapa kandungnya lebih penting. Isu undang-undang ini sepatutnya diberi pertimbangan penuh selepas penyuaan penuh fakta matrik untuk menentukan fakta-fakta isu yang menjadi pertikaian. Hakim Mahkamah Tinggi gagal melakukan ini. Beliau terkhilaf dalam memutuskan dengan ringkas hujahan undang-undang yang penting. Lampiran 16 oleh defendan-defendan ditolak. Hakim Mahkamah Tinggi terkhilaf kerana terlalu mementingkan kebimbangan menjadikan Kanak-kanak C tidak sah taraf. Polisi sebalik s. 112 AK yang kononnya tidak ingin menjadikan kanak-kanak tidak sah taraf tidak lagi boleh menjadi falsafah kehakiman dalam dunia moden yang mempunyai kecanggihan global dalam sains dan undang-undang antarabangsa hak asasi manusia. A B C D
- (3) Defendan-defendan menafikan hujahan-hujahan yang dibuat oleh plaintif berkenaan hubungannya dengan defendan pertama dan Kanak-kanak C. Kesemua ini perkara-perkara penting. Tuntutan plaintif tidak sepatutnya ditolak terus tanpa penentuan kehakiman isu-isu penting ini. Penentuan hanya boleh dibuat selepas keterangan penuh *viva voce*. Lampiran 5 dikembalikan ke Mahkamah Tinggi dan ditukar menjadi tindakan writ. Ini selaras dengan A. 1A, A. 2 k. 1, A. 28 k. 8 dan A. 92 k. 4 KKM. Dengan cara ini, pihak-pihak boleh menyuarakan semua isu sepenuhnya. E F

Case(s) referred to:

- Babu Remyalayam Veettil v. Vidya Santhini Kalathinte Padeetthathil Veettil* (OP (FC) No. 507 of 2014 (R) (*refd*))
- Bato Bagi & Ors v. Kerajaan Negeri Sarawak & Another Appeal* [2011] 8 CLJ 766 FC (*refd*) G
- Chua Kim Suan v. Ang Mek Chong* [1988] 3 MLJ 231 (*refd*)
- Minister for Immigration and Ethnic Affairs v. Teoh* [1995] 128 ALR 353 (*refd*)
- Noorfadilla Ahmad Saikin v. Chayed Basirun & Ors* [2012] 1 CLJ 769 HC (*refd*)
- Rohit Shekhar v. Narayan Datt & Anor* (FAO(OS) No. 547/2011 (*refd*))
- Shri Rohit Shekhar v. Shri Narayan Dutt Tivoari & Anor* IA No 4720/2008 (*refd*) H
- The State of Punjab v. Shamlal Murari & Anor* [1976] 1 SCC 719 (*refd*)

I

A Legislation referred to:

Courts of Judicature Act 1964, s. 15(2)

Evidence Act 1950, s. 112

Rules of Court 2012, O. 1A, O. 2 r. 1, O. 5 rr. 2, 4, O. 14A, O. 28 r. 8, O. 92 r. 4

B *For the appellant - Honey Tan Lay Ean; M/s Tan Law Practice*

For the respondents - YN Foo & Kiran Dhaliwall; M/s YN Foo & Partners

[Editor's note: Appeal from High Court, Kuala Lumpur; Originating Summons No: 24F-107-07-2015 (overruled).]

Reported by Najib Tamby

C

JUDGMENT

Nallini Pathmanathan JCA:

Introduction

D [1] This appeal raises one question of law fundamental to the welfare of a child. It is:

To what extent does section 112 of the Evidence Act 1950 ('EA') apply, if at all, in a suit to determine paternity.

E [2] Pursuant to s. 15(2) of the Courts of Judicature Act ('CJA') 1964, the names of all the parties and the child concerned will not be published in this judgment. For ease of reference, parties will be referred to as they were in the court below.

Salient Facts

F [3] First defendant is a female who is an air stewardess/flight attendant. The second defendant is a pilot and the first defendant's husband. The defendants married on 3 March 2007. On 23 June 2008, the first defendant gave birth to her daughter who will be referred to in this judgment as Child C. Child C thus was born into a valid marriage between the defendants.

G [4] The plaintiff is a male and also makes his living as a pilot. He works in the same airline as the first defendant but different from that of the second defendant. We consider it significant to highlight that all the parties concerned in this suit are non-Muslims.

H [5] It is the plaintiff's claim that he had been having an affair with the first defendant even before her marriage to the second defendant, and that this affair continued even after the defendants' marriage.

I

[6] The plaintiff claims that when Child C was born, he had lived periodically with the first defendant and Child C as a family, notably when the second defendant was on flight duty. This remains a disputed fact. The second defendant was not in the country at this point. The plaintiff also alleged that all this while, he had been paying the first defendant a monthly sum as “maintenance” for Child C, initially in the amount of RM1,000 per month and that he later increased this to RM3,000 per month. He claimed that his payment of this “maintenance” only stopped when the first defendant closed her Maybank account *circa* August 2014. The plaintiff asserted that the first defendant stopped giving him access to Child C in December 2013 and ended their relationship in early 2014.

[7] The plaintiff sought recourse by filing this suit, namely this amended originating summons (‘encl. 5’) praying for the following reliefs:

- (i) That a DNA test be carried out in order to determine whether the plaintiff is the biological father of the said child;
- (ii) If the test shows that the plaintiff is the father of the said child then:
 - (a) The plaintiff be declared as the biological father of the said child;
 - (b) The birth certificate of the said child be rectified to name the plaintiff as the biological father;
 - (c) The plaintiff be given joint guardianship;
 - (d) Reasonable access rights according to the plaintiff’s work schedule;
 - (e) The defendants or their representatives be prevented from bringing the said child out of the country without the written permission of the plaintiff.
- (iii) Alternatively, if the DNA test is negative, the plaintiff will withdraw prayers (a) to (e) above.

[8] The plaintiff filed encl. 5 on the grounds, *inter alia*, that it was necessary for Child C to know who her birth father was, in case of any medical emergencies that may arise in the future.

[9] The defendants opposed the action. They argued that if the court allowed the plaintiff’s declaration on the point of paternity, ie, declaring the plaintiff as the Child C’s biological father, the said declaration would render Child C an illegitimate child – being born out of the wedlock between the defendants.

A [10] The defendants accordingly retaliated with an application of their own for the determination of questions of law pursuant to O. 14A of the Rules of Court ('ROC') 2012 and s. 15 of the CJA 1964. They prayed for the following reliefs ('encl. 16'):

- B (i) Since s. 112 of the Evidence Act (EA) 1950 states that the said child (name omitted) who was born to the defendants during the subsistence of a legal marriage, is the legal child of the defendants, that the plaintiff's application in encl. 5 (the amended OS) must be dismissed with costs;
- (ii) That the plaintiff's amended OS dated 27 July 2015 be stayed pending the decision of this notice of application and the question in para. (i) above;
- C (iii) If prayer (i) above is dismissed, that both the defendants be allowed to file their affidavits in reply within 14 days from the date of this order;
- (iv) That the names, addresses, details and any other evidence whether oral or documentary to these proceedings which may lead to the identification of the parties and the said child not be published or caused to be published by any party and that the said names and/or identity of the said child be referred to by initials only;
- D (v) Any further or other relief the court deems fair and reasonable;
- E (vi) Costs to be borne by the plaintiff.

[11] Parties subsequently agreed upon paras. (ii) and (iii) of encl. 16 by consent. The plaintiff also made an oral application to withdraw prayers (b), (c), (d) and (e) of encl. 5, which the High Court allowed. In the result, the plaintiff now only substantively seeks prayers (i) and (a) in encl. 5 which is, for the court to order a DNA test to determine Child C's paternity and the resulting declaration that the plaintiff is her father.

F

[12] The High Court Judge allowed prayer (i) of encl. 16 and dismissed encl. 5 on the grounds that the plaintiff's action in the said encl. 5 was without merit and had no legal basis ('the impugned order').

G

[13] The aggrieved plaintiff's appeal came before us. We heard and unanimously allowed the appeal on 5 September 2017. We ordered that the impugned order be set aside, encl. 16 was dismissed and that the plaintiff's amended OS be converted into a writ action so that the disputed facts could be fully ventilated *vide viva voce* evidence. We accordingly remitted the matter to the High Court for trial. We made no order as to costs and also ordered that the deposit be refunded to the plaintiff.

H

I

The Decision Of The High Court

A

[14] The High Court, after referring to certain local and Indian authorities, made the impugned order substantially on two fronts.

[15] Firstly, that the plaintiff's action is caught by s. 112 of the EA. The DNA test sought by the plaintiff concerns both the paternity and legitimacy of Child C. The said s. 112 presumes the fact of marriage as conclusive proof of legitimacy. Being born into the defendants' marriage is thus conclusive proof that Child C is their legitimate child. This presumption, it is said, may only be rebutted on the grounds of 'non-access' between the parties to the marriage. The law therefore does not authorise the use of DNA tests to challenge paternity and to rebut the said presumption in this way.

B

C

[16] The second reason concerns public policy. The High Court opined that allowing the DNA test will have adverse effects on the welfare of Child C. A declaration that Child C is in effect an illegitimate child will bring about negative public perception over her and disrupt the stability of the defendants' family to raise Child C in a loving environment.

D

[17] The High Court Judge was of the view that if the DNA test was allowed and Child C was discovered to be illegitimate, it would have negative consequences for Child C and disrupt her happy family life. Her Ladyship opined that it may be a different situation if the defendants admitted that the plaintiff was the father of Child C and the birth certificate did not state the name of the father. However, in this case, the defendants' names are on the birth certificate and they have raised Child C. The plaintiff did not dispute that Child C was born during the subsistence of the defendants' marriage. Therefore, the High Court Judge held that the birth certificate is conclusive proof that the defendants were legally married when Child C was born. She made her decision to allow encl. 16 and to dismiss encl. 5 supposedly premised on the best interests of the said child.

E

F

Submissions Of Parties On Appeal

[18] At the outset, we are constrained to state that the parties' submissions were not entirely sufficient to fully assist us. As a result, we had to undertake further research to ensure that the interests of the child were fully considered and protected. That being said, we attempt to sum up their submissions here.

G

[19] The plaintiff argued that encl. 5 had nothing to do with the legitimacy of Child C. Instead, the plaintiff was only concerned with determining her paternity. Counsel referred to article 7 of the United Nations Convention on the Rights of the Child ('UNCRC') to argue that the best interests of the child was for the child to know his or her biological parents. Section 112 of the EA has nothing to do with this case and hence, the learned judge erred by

H

I

A holding that Child C's legitimacy precedes the child knowing the truth of her paternity. No argument was advanced to support the plaintiff's assertion that courts can order DNA tests to determine paternity.

B [20] The defendants argued that the declaration of paternity sought by the plaintiff has the 'plain, obvious and unavoidable effect of illegitimising the child'. Section 112 of the EA thus clearly applies and the only rebuttal evidence permissible under the law is that of 'non-access' between the married couple. They also relied on Indian authorities to argue that the best interest of Child C, and the policy behind s. 112 of the EA, is in not illegitimising the child. Thus, the learned judge was correct in determining it to be in the best interests of Child C to continue to enjoy the stability of her relationship with the defendants and not to be stigmatised by the negative public perception of illegitimacy.

C [21] We were not persuaded by either the arguments advanced by the defendants or the reasoning of the learned judge who adopted the defendants' arguments *in toto*. Our reasons for so saying so are set out below.

D [intentionally left blank]

Our Decision

Legitimacy, Paternity, And Section 112 Of The EA

E [22] It was our considered view that the learned judge fell into error when Her Ladyship linked paternity with legitimacy. Section 112 of the EA only concerns the latter ie, legitimacy. We find authority for this proposition in the decision by KC Vohrah J (as he then was) in *Chua Kim Suan v. Ang Mek Chong* [1988] 3 MLJ 231, at p. 234:

F That brings me to the argument, this time, of defence counsel. He says once it is accepted by the court that the defendant gave birth to Pang Hua then the presumption in s. 112 of the Evidence Act 1950 should be invoked that since the birth was during the marriage of the deceased and the defendant it is conclusive that the child is the child of the deceased and that the only way of disproving that is to show that the defendant and the deceased had no access to each other. *With respect, the argument of counsel is misconceived. The issue is not one of the legitimacy of the child, whether the child was born in or out of wedlock but whether the child was the issue of one set of lawfully wedded parents or another set of lawfully wedded parents and therefore the provisions of s. 112 of the Evidence Act are not applicable in this case.* (emphasis added)

G [23] In other words, s. 112 of the EA does not bar enquiry into the paternity of a child. Paternity and legitimacy are two distinct, though admittedly, interrelated concepts. As has already been said, s. 112 of the Malaysian and Indian Evidence Acts are in *pari materia*. Indian decisions will

thus shed light on this point of law. We draw support for this distinction between “paternity” and “legitimacy” from the decision of the High Court of Kerala in *Babu Remyalayam Veettil v. Vidya D/o Santhini Kalathinte Padeetthathil Veettil* (OP (FC) No. 507 of 2014 (R) decided on 26 November 2014) where K. Harilal J held as follows:

10. The term “legitimacy” employed under Section 112 of the Evidence Act refers and determines the legal status of birth, ie, whether legitimate or illegitimate. To put it differently, legitimacy of a child is its right to be officially or legally as such. There, the question in controversy may be whether the child is born in a legally valid marriage or not. Thus, the presumption of “legitimacy” follows subsistence of a valid marriage and the same is conclusive proof of the legitimate birth of the child, unless it is rebutted by the evidence of non-access. Therefore, no evidence can be adduced for the purpose disproving it, unless and until non-access between the spouses is shown ...

11. Whereas, paternity is the state or fact of being father of a particular child ... *In short, legitimacy and paternity are different and distinct. In our view, in that enquiry to find out the true fatherhood of a child, the legal presumption as to the legitimacy under Section 112 of the Evidence Act would not bar a scientifically accurate and approved test, if the facts and circumstances of the case tend to make such an enquiry imminently needed.* When the fatherhood of a child can be determined accurately without doubt by the DNA test, there is no need to ascribe the fatherhood on an innocent person on presumption ... Since the legitimacy and paternity are distinct and different and working under different spheres in different perspective ... the presumption under *Section 112 of the Evidence Act* cannot be extended or stretched so as to put as a legal bar in the way of enquiry to find out the true fatherhood of a child. We are of the further opinion that in every enquiry, the method to be adopted depends upon the ‘fact in issue’ to be determined. (emphasis added)

[24] We were of the view that the concepts of “paternity” and “legitimacy” should necessarily be separated. The former concerns a question of fact; the latter a question of law. Section 112 of the EA constitutes adjectival law, and it is trite that adjectival law must be interpreted liberally so as not to defeat the rights of parties. This is all the more so when it comes to s. 112 of the EA which dates back to 1872. It is an outdated and anachronistic legal provision that ought to be construed and given effect in line with modern day scientific advancements.

[25] We find strong support for our above view in the decision of the Indian Supreme Court in *The State of Punjab v. Shamlal Murari & Anor* [1976] 1 SCC 719, at para. 8 which held:

A We must always remember that processual law is not to be a tyrant but a servant, not an obstruction but an aid to justice. It has been wisely observed that procedural prescriptions are the hand-maid and not the mistress, a lubricant, not a resistant in the administration of justice.

B [26] On the interpretation of s. 112 of the EA, the High Court of Delhi quite recently in its unreported judgment in *Rohit Shekhar v. Narayan Datt & Anor* (FAO(OS) No. 547/2011 decided on 27 April 2012), at para. 21, cited with approval the following passage from Bennion on “*Statutory Interpretation*” (2nd edn) which we respectfully adopt:

C It is presumed the Parliament intends the Court to apply to an ongoing Act a construction that continuously updates its wordings to allow for changes since the Act was initially framed. While it remains law, it has to be treated as always speaking. This means that in its application on any day, the language of the Act though necessarily embedded in its own time, is nevertheless to be construed in accordance with the need to treat it as a current law.

D In construing an ongoing Act, the interpreter is to presume that Parliament intended the Act to be applied at any future time in such a way as to give effect to the original intention. Accordingly, the interpreter is to make allowances for any relevant changes that have occurred since the Act’s passing, in law, in social conditions, technology, the meaning of words and other matters. ... That today’s construction involves the supposition that Parliament was catering long ago for a state of affairs that did not then exist is no argument against that construction. Parliament, in the wording of an enactment, is expected to anticipate temporal developments. The drafter will foresee the future and allow for it in the wording. An enactment of former days is thus to be read today, in the light of dynamic processing received over the years, with such modification of the current meaning of its language as will now give effect to the original legislative intention. The reality and effect of dynamic processing provides the gradual adjustment. It is constituted by judicial interpretation, year in and year out. It also comprises processing by executive officials.

G [27] We address first the argument by the defendants that a declaration of paternity has the effect of illegitimising a child. This appears to be the legal conundrum created by s. 112 of the EA.

H [28] Our law, and indeed the law of many civilised nations, recognises that a child may in fact be an illegitimate child, but, by operation of the law, the said child may still be considered legally legitimate. We seek to illustrate this point.

I

[29] There is another point. This concerns the policy point behind s. 112 of the EA. To paraphrase what was said earlier, the learned judge relied on outdated Indian authorities to hold that the policy behind s. 112 of the EA is to prevent the illegitimising of children. That, it was said, is in the best interest of Child C. A

[30] The plaintiff relied on article 7 of the UNCRC to argue that the best interests of children require that they have a right to know who their biological parents are. The said article 7 reads as follows: B

Article 7

1. The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and as far as possible, **the right to know and be cared for by his or her parents.** (emphasis added) C

[31] Since the UNCRC has been cited to us, we also think that article 3 of the same would be relevant to this suit. The relevant portion of article 3 reads: D

Article 3

1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, **the best interests of the child shall be a primary consideration.** (emphasis added) E

[32] The prevailing rule is that international treaties and conventions are not directly applicable to domestic law until and unless they are incorporated into domestic law. See: *Bato Bagi & Ors v. Kerajaan Negeri Sarawak & Another Appeal* [2011] 8 CLJ 766. The plaintiff has not shown us how the above-cited articles are applicable in Malaysia. F

[33] That being said, where the law is ambiguous, the courts will still be charged with the duty to interpret local statutes in a manner where their 'language will be in conformity and not in conflict with international law'. This includes the development of common law 'by reference to statutory policy'. See *Noorfadilla Ahmad Saikin v. Chayed Basirun & Ors* [2012] 1 CLJ 769; [2012] 1 MLJ 832, at paras. 32-35 (CLJ); para. 29 (MLJ) citing Mason CJ of the High Court of Australia in *Minister for Immigration and Ethnic Affairs v. Teoh* [1995] 128 ALR 353, at p. 363: G

But the fact that the convention has not been incorporated into Australian law does not mean that its ratification holds no significance for Australian law. *Where a statute or subordinate legislation is ambiguous, the courts should favour that construction which accords with Australia's obligations under a treaty or international convention to which Australia is a party* (*Chu Kheng Lim* H

I

A *v. Minister for Immigration* (1992) 176 CLR 1), at least in those cases in which the legislation is enacted after, or, in contemplation of, entry into, or ratification of, the relevant international instrument. That is because Parliament, *prima facie*, intends to give effect to Australia's obligation under international law. *It is accepted that a statute is to be interpreted and applied, as far as its language permits, so that it is in conformity and not in conflict*

B *with the established rules of international law* (*Polites v. The Commonwealth* (1945) 70 CLR 60). Apart from influencing the construction of a statute or subordinate legislation, *an international convention may play a part in the development by the courts of the common law. The provisions of an international convention to which Australia is a party, especially one which declares universal fundamental rights, may be used by the courts as a legitimate guide in developing the common law ...*

C *But the courts should act in this fashion with due circumspection when the Parliament itself has not seen fit to incorporate the provisions of a convention into our domestic law. Judicial development of the common law must not be seen as a back door means of importing an unincorporated convention into Australian law. A cautious approach to the development of the common law by reference to international conventions would be consistent with the approach which the courts have hitherto adopted to the development of the common law by reference to statutory policy and statutory materials* (*Lamb v. Cotogno* (1987) 164 CLR 1 at pp 11-12). *Much will depend upon the nature of relevant provision, the extent to which it has been accepted by the international community, the purpose which it is intended to serve and its relationship to the existing principles of our domestic law.* (emphasis added)

D

E

[34] We are mindful that Malaysia made a reservation against article 7(1) of the UNCRC. The said reservation reads:

F The Government of Malaysia accepts the provisions of the Convention on the Rights of the Child but expresses reservations with respect to articles 1, 2, 7, 13, 14, 15, [...], 28, [paragraph 1 (a)] 37, [...] of the Convention and declares that the **said provisions shall be applicable only if they are in conformity with the Constitution, national laws and national policies of the Government of Malaysia.** (emphasis added)

G [35] However, this 'supposed' policy reasoning behind s. 112 of the EA in not wanting to legitimise children ought no longer to be the sole judicial philosophy in light of modern day global advancements in science and international human rights law. We find strong support for this view in the judgment of Ravindra Bhat J in *Shri Rohit Shekhar v. Shri Narayan Dutt Tivoari & Anor* IA No 4720/2008 (at para. 34 of this judgment) and we concur with

H his views. His Lordship held as follows:

I 22. The entire focus of attention and legislative concern in enacting Section 112 with a near impregnable presumption of legitimacy was premised on the welfare or best interests of a child, and society's assurance that a child born to a woman after the marriage, should not except under limited circumstances be exposed to any inquiry about who was his true father. This overarching concern also was aimed at protecting

a woman from allegations of unchastity, and the resultant harassment that she could be subjected to in legal proceedings. While those concerns are as real today as they were when the provision was enacted, nevertheless *subsequent changes in women's status, the rights enjoyed by them, scientific developments and advancements, and changes in legal provisions which recognize a child's right to know its biological antecedents, cannot be ignored.*

A

23. The right of the child to know of her (or his) biological antecedents is now recognised internationally as being of critical importance. Major international instruments such as the UN Declaration on Human Rights have recognised the rights of a child irrespective of her (or his) legitimacy and the Convention on the Rights of Child, 1990 has expressly specified a right to knowledge of parenthood.

B

24. The Convention therefore, specifically requires that as far as possible, the State must enable the child to know of his true paternity ...

C

25. A child's right to know of her or his biological parentage has had a critical influence also in many developments in Europe that have led to lifting the anonymity of a donor in assisted pregnancies and in case of sperm donors. Such donors remained anonymous in Europe till the 1980s. However, later developments mark a shift from the anonymity based approach, and the Courts, tend to lean in support of the child's right to know her or his biological antecedents. Similar laws have been passed in many countries all over the world (such as Sweden in 1985, following which almost all of Europe with the latest addition of the United Kingdom has followed suit) ... *These developments all over the world indicate that there is a very tenable argument in the child's interests that support its right to know the truth of its origin.* (emphasis added)

D

E

[36] We do not see why the aforementioned principles are not applicable in Malaysia. As we have already held, s. 112 of the EA does not bar enquiries into paternity yet, at the same time, conclusively presumes legitimacy. Enquiries *per se* into paternity do not in this sense illegitimise a child. Thus, this emphasis on the fear of illegitimising the said child is not the determining factor when deciding to order a DNA test to determine paternity. Instead, the best interest of the child to know its biological parents is the larger concern. In this vein, the learned judge fell into error in Her Ladyship's pre-occupation with the supposed fear of illegitimising Child C.

F

G

[37] This legal issue should have been accorded full consideration after a full ventilation of the factual matrix to determine the disputed factual issues. This, Her Ladyship failed to do, merely adopting the arguments of the defendants entirely, as we pointed out earlier.

H

[38] In these circumstances, we were satisfied that the learned judge had erred in summarily determining an important point of law effectively *in vacuo*. We therefore dismissed the defendants' O. 14A application in encl. 16, and remitted the matter to the High Court by way of a writ action.

I

A *The Conversion Of Enclosure 5 Into A Writ Action*

[39] In allowing the plaintiff's appeal, we were of the view that the plaintiff's amended OS in encl. 5 had to be converted into a writ action.

B [40] It is trite that when there is a substantial dispute as to fact in any proceedings, such proceedings shall be begun by writ. If at all authority is needed, see: O. 5 rr. 2 and 4 of the ROC 2012. In our reading of the affidavits in this action, it is as plain as pikestaff that the defendants deny many of the allegations made by the plaintiff in respect of his purported relationship with the first defendant and Child C. These are crucial matters. The plaintiff's claim ought not to have been dismissed outright in the absence of judicial determination on these crucial issues. Such determination can only be made with full *viva voce* evidence.

C [41] In this vein, we ordered that encl. 5 be remitted to the High Court and be converted into a writ action. We did so in accordance with O. 1A, O. 2 r. 1, O. 28 r. 8 and O. 92 r. 4 of the ROC 2012. In this way, parties may fully ventilate all issues. If at all precedent is needed, we refer to the decision of the Court of Appeal in *Lee Lai Cheng No. 2* (*supra* at para. 62) where this court remitted the O. 14A application to the High Court for trial. This stood independently from the point as to whether our courts are empowered to order DNA tests under their inherent jurisdiction.

E

Conclusion

[42] We began this judgment by identifying one issue of primary concern. We summarise our judgment as follows:

- F (i) The High Court erred in summarily dismissing the plaintiff's claim solely on its limited construction of s. 112 of the EA without attempting to consider the factual disputes patently clear on the face of the opposing affidavits. This in itself, rendered the application for disposal under O. 14A of the ROC untenable. The learned judge failed to recognise that the said s. 112 ought to have been construed in the context of the factual matrix after a determination of the factual disputes. Her Ladyship's failure to do so effectively meant that s. 112 of the EA was construed *in vacuo*.
- G
- H (ii) 'Paternity' and 'legitimacy' are separate issues. Paternity is a question of fact whereas legitimacy is a question of law. Section 112 of the EA only concerns legitimacy. It does not bar enquiries into paternity.
- I (iii) In a suit where only paternity and not legitimacy is in issue, the law conclusively presumes that the child whose paternity is in question is the legitimate child of the man to whom the mother was lawfully married at the time of the said child's birth. The 'access' proviso to s. 112 of the EA is only invoked if the child's legitimacy is challenged.

- (iv) In determining whether a paternity test ought to be ordered, the court must have regard to the best interests of the child. 'Best interests' here refers to the right of the child to know who his or her biological parents are. The court ought not to be concerned solely or wholly with fears of 'illegitimising the child'. When the factual disputes have been determined, the trial court can then go on to balance the competing interests of paternity and legitimacy and arrive at a fair and just determination of the matter. As matters stand, the plaintiff has been effectively deprived of the right to be heard fully. A B
- (v) It remains incumbent on the High Court to decide whether or not to order a DNA test based on its construction of the law and in the context of the factual dispute before it. C

[43] Ultimately we determined that no matter the parties' personal convictions, it is in the best interests of Child C that is the determinative factor. This remains an issue to be considered fully by the High Court. D

E

F

G

H

I